

### **Remarks/Arguments**

The Applicants would like to thank Examiner Shin and Supervisory Examiner Wiley for the interview on August 2, 2007. This Response is provided in response to a Non-Final Office Action mailed June 22, 2007, in which the Examiner rejected claims 1-9, 13, and 15-29 under 35 U.S.C. §102(e) as being anticipated over the prior art, and in which the Examiner rejected claims 10-12 and 14 under 35 U.S.C. §103(a) as being obvious in view of the prior art, and incorporates the arguments made during the interview. The Examiner further rejected claims 1, 15, and 16 under 35 U.S.C. 112 as failing to comply with the written description requirement. In view of the present remarks, the Applicants believe that claims 1-29 are presently in condition for allowance.

### **Rejection of claims under 35 U.S.C. 112**

As discussed during the aforementioned interview and accepted as persuasive by the Supervising Examiner present, claims 1, 15, and 16 do not include language which was not described in the specification in such a way as to reasonably convey to one skilled in the art that the inventors, at the time the invention was filed, had possession of the claimed invention. The Examiner specifically cited the language “non-sequential” as failing to meet the requirements of U.S.C. 112. Specifically, the application on page 5 lines 25-27 support a testing methodology wherein tests are performed simultaneously or within a close time proximity. The language of performing tests non-sequentially encompasses the same subject matter. When tests are performed sequentially, they must, by definition, follow one after another. Therefore, as the claimed tests are run non-sequentially, they are run simultaneously (within the mechanical tolerance of the device performing the testing) and as such not performed one after another. Thus, the language “non-sequential” testing would convey to one skilled in the art that the inventors were claiming subject matter that was within their possession at the time the invention was filed. As such, the Applicants respectfully request that the Examiner remove the rejection of claims 1, 15, and 16 under U.S.C. 112.

### **Rejection of Claims Under 35 U.S.C. §102(e)**

The Office Action rejected claims 1-9, 13, and 15-29 under 35 U.S.C. §102(e) as being unpatentable over United States Patent No. 6,763,380 issued to Mayton et al., July 13, 2004 (Mayton). The Applicants respectfully traverse this rejection.

### ***Legal Precedent***

Anticipation means a lack of novelty, and is a question of fact which is reviewed by the reviewing court using a substantial evidence standard. *Brown v. 3M*, 60 USPQ2d 1375 (Fed. Cir. 2001); *Baxter Int'l, Inc. v. McGaw, Inc.*, 47 USPQ2d 1225 (Fed. Cir. 1998). To anticipate a claim, every limitation of the claim must be found in a single prior art reference, arranged as in the claim. *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 58 USPQ2d 1286 (Fed. Cir. 2001). *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S.Ct. 1831 (2002). Each such limitation must be found either expressly or inherently in the prior art reference. *Schering Corporation v. Geneva Pharmaceuticals, Inc.*, 02-1540, Decided August 1, 2003 (Fed. Cir. 2003). Accordingly, the Applicants need only point to a single element not found in the cited reference to demonstrate that the cited reference fails to anticipate the claimed subject matter.

### ***The cited reference fails to show processor initiated simultaneous execution of the first and the second non-sequential tests of a first type over two paths as recited by independent claims 1, 15, 16, and 21.***

Current claims 1, 15, 16, and 21 recite conducting a first performance test of a first type over a first path of the plurality of paths between a first and second device; conducting a second performance test of the first type over a second path of the plurality of paths between the first and second device; and wherein a processor initiates the simultaneous execution of the first and the second non-sequential performance tests. Pictorially, this can be illustrated by the following Figure 1:

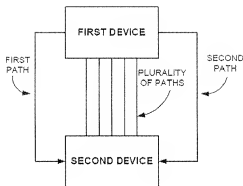


FIG. 1

In contrast, the examiner cites Mayton: Col.8, lines 23-26 for the proposition that tests are performed simultaneously. When this section of Mayton is read in context, it becomes clear that this section of the Mayton patent is describing simultaneous testing described in Figure 2 of Mayton, reproduced below:

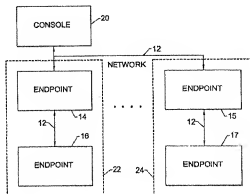


FIG. 2.

The written description of Mayton describes testing endpoint node pairs 22 and 24 by console 20. Col. 7, lines 61-67. Mayton further goes on to describe testing these nodes (22, 24) periodically, as well as simultaneously. Mayton: Col. 8, lines 1-6 and 23-26.

There is not described in the text above, nor in any other portion of Mayton, a showing of utilizing a processor to initiate the execution of first and second non-sequential performance tests of a first type along two paths between a first and a second device as

claimed in claims 1, 15, 16, and 21. Mayton instead discloses producing a test which is simultaneously executed by a first device (Console 20), and run along a path between that first device (Console 20) and a second device (Endpoint 22), as well as a test executed by a first device (Console 20) and run along a path between that first device (Console 20) and a third device (Endpoint 24). Therefore, while the Applicants' invention calls for simultaneous execution of a non-sequential test along two paths between two devices, Mayton describes simultaneous testing along two paths of three devices (Console 20, Endpoint 22, and Endpoint 24). Thus, the simultaneous testing of Mayton does not initiate the simultaneous execution of the first and the second non-sequential performance tests simultaneously between a first and second device.

Therefore, Mayton fails to anticipate every limitation of independent claims 1, 15, 16, and 21. Furthermore, based at least upon their dependency to claims 1, 16, and 21, claims 2-14, 17-20, and 22-29 are not anticipated by Mayton. For at least these reasons among others, the Applicants respectfully request withdrawal of the rejections under 35 U.S.C. § 102, and passage of claims 1-29 to allowance.

#### **Rejection of Claims Under 35 U.S.C. §103(a)**

The Office Action further rejected claims 10, 11, and 14 under 35 U.S.C. §103(a) as being unpatentable over Mayton in view of United States Patent No. 6,360,268 issued to Stephen Silva et al., March 19, 2002 (Silva). This rejection is respectfully traversed.

#### ***Legal Precedent***

To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). ). If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). The Supreme Court has recently stated that, “[A] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art,” and that “A court must ask whether the improvement is more than the predictable use of prior art elements

according to their established functions.” *KSR Intern. Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1731.

***The cited references, taken alone or in combination, fail to teach or suggest features recited by claims 10, 11, and 14.***

Claims 10, 11, and 14 depend from independent claim 1, and include all limitations of independent claim 1. As discussed above in the section titled “Rejection of Claims Under 35 U.S.C. §102(e)”, Mayton fails to teach or suggest the amended limitations of claim 1. Silva supplies neither the missing elements nor a showing for the combinability of the two references. Thus, neither Mayton nor Silva, taken alone or in combination, teach the above limitations of claim 1. Due to at least the dependencies of claims 10, 11, and 14 on claim 1, the cited references, taken alone or in hypothetical combination, cannot render obvious claims 10, 11, and 14. For at least these reasons, as well as for reasons previously presented, the Applicants request withdrawal of the rejection of claims 10, 11, and 14 under 35 U.S.C. §103(a), and passage of same to allowance.

**Rejection of Claims Under 35 U.S.C. §103(a)**

The Examiner further rejected claim 12 under 35 U.S.C. §103(a) as being unpatentable over Mayton in view of U.S. Publication No. 2003/0036865, inventor ZhangQing Zhuo et al., February 20, 2003, (Zhuo).

***The cited references, taken alone or in combination, fail to teach or suggest features recited by claim 12.***

As discussed above in the section titled “Rejection of Claims Under 35 U.S.C. §102(e)”, Mayton fails to teach or suggest the amended limitations of claim 1. Zhuo supplies neither the missing elements nor a showing for the combinability of the two references. Thus, neither Mayton nor Zhuo, taken alone or in combination, teach the above recitations of claim 1. Due to at least the dependency of claim 12 on claim 1, the cited references, taken alone or in hypothetical combination, cannot render obvious claim 12. For at least these reasons, as well as for reasons previously presented, the Applicants

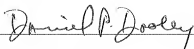
request withdrawal of the rejection of claim 12 under 35 U.S.C. §103(a), and passage of same to allowance.

**Conclusion**

The Applicants respectfully submit that all pending claims should be in condition for allowance. This Response is intended to be a complete response to the Non-Final Office Action mailed June 22, 2007.

However, if the Examiner believes certain amendments are necessary to clarify the present claims or if the Examiner wishes to resolve any other issues by way of a telephone conference, the Examiner is kindly invited to contact the undersigned attorney at the telephone number indicated below.

Respectfully submitted,

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